THE POINT NOW REACHED IN THE FEDERAL REGULATION OF INTRASTATE RATES

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Federal Authority over Intrastate Commerce before the Shreveport Cases

The principal motive which actuated the sovereign states in sending delegates to the convention which framed the Constitution of the United States is not mentioned in the Preamble to that instrument but is found in Article 1, Section 8, which delegates to Congress, among other things, the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

The history of the period following the treaty of peace with Great Britain and prior to the ratification of the Constitution amply bears out this statement. To find a remedy for the conflict between the states which threatened to destroy the weak offensive and defensive alliance of the original thirteen states which was embodied in the Articles of Confederation, Rhode Island presented resolutions calling for a central body to regulate commerce; James Monroe, as a member of the federal Congress, brought in resolutions saying that such regulation was absolutely essential; and James Madison introduced in the legislature of Virginia and had passed resolutions similar to those adopted by Rhode Island with additional provisions calling for a convention at Annapolis to establish a better system of commercial regulations.

Six states sent representatives to the Annapolis Convention of 1786 and they, after extended discussion, came to the conclusion that no remedy for the evils complained of could be prescribed without drastic changes in the powers of the central government which would require the framing of a new constitution. In accordance with this conclusion the delegates to the Annapolis Convention issued the call for a constitutional convention.

Attention is called to these facts as an aid in placing a proper construction upon the commerce clause of the Constitution and in

defining the spheres of action within which the federal and state governments may properly operate.

It does not seem possible that there could have been any doubt in the minds of those who acted for the several states in ratifying the Constitution as to the *exact* power conferred on the federal government in connection with the regulation of interstate commerce since the granting of this power to the federal government was the most important single purpose of the framers of that instrument.

In the debate between those who favored and those who opposed a strong central government and the Constitution of the United States, which provides such a government to do for all the states what they cannot do so well for themselves but retains for the several states the functions which can best be performed by state governments, this question was discussed.

The supporters of the federal plan argued that the commerce clause of the Constitution permitted the new government to control interstate commerce only and that the states were left free to exercise all the governmental powers which had not been specifically delegated.[1] To ensure this construction of the Constitution some of the states insisted upon the passage of the first ten amendments which were primarily designed to preserve the rights of individuals and the several states against any encroachment on the part of the federal government.

It may therefore be said that there was no intent to deprive the several states of power to regulate their internal commerce by any construction placed upon the commerce clause but on the other hand such power was clearly and specifically reserved to the states by the Tenth Amendment.

This division of authority was recognized by the supreme court of the United States in deciding the first case arising under the commerce clause[2] in which a state enactment was set aside *because it directly regulated and impeded interstate commerce and was hence beyond the power of the state* and not because of any lack of power on the part of the state to regulate its internal commerce, such powers being discussed and upheld in the decision of the court.

The case just referred to is typical of many, other than rate cases, in which the Supreme Court of the United States has uni-

[1] *The Federalist*, 32, 82.

[2] *Gibbons* v. *Ogden*, 9 Wheat 1.

formly held that a state cannot lawfully enact regulations of its commerce which operate to burden unduly or impede interstate commerce. In such cases involving navigation laws, safety appliance acts, taxation of interstate commerce and related subjects there has been a conflict between a statute of the state and a valid act of Congress or, an attempted exercise, by the state, of the power granted to Congress by the commerce clause.

As to cases involving the validity of state legislation fixing maximum rates for transportation by railroad, or the lawful orders of state railroad commissions, it may be said that there has been practically no conflict with the power of the federal government under the commerce clause.

It is true that there have been many cases in which it was alleged that the states had interfered with or unduly burdened interstate commerce but a careful examination of all such cases from *Munn* v. *Illinois* (94 U. S. 113) down to the Minnesota Rate Case (230 U. S. 352) shows that the contentions advanced as to such alleged interference with interstate commerce were mere incidents to the efforts of the railroads to escape regulation by public authority.

It is a significant fact and a fortunate circumstance for the cause of public regulation of carriers and utilities that the Supreme Court has steadfastly refused to condemn state regulation on such alleged grounds.

State regulation of railroads was first attempted about 1873 responsive to widespread complaint as to the arbitrarily unjust, unreasonable and discriminatory charges imposed upon the internal commerce of the various states by common carriers.

It is a striking commentary on the wisdom of our *federal plan* of government to note the quick responsiveness of the state governments to the popular demand for relief from oppression by common carriers as compared with the course of congressional action looking toward relief for interstate commerce from similar evils.

In 1874 the Windom Committee reported as to transportation routes to the seaboard but no action was taken by Congress. When the Cullom Committee reported and the Act to Regulate Commerce was enacted in 1887, many states had already provided railroad commissions with full rate-making powers. *Congress did not give the Interstate Commerce Commission power to fix maximum rates until 1906.*

During the period between the enactment of the first granger laws and the passage of the Hepburn Act in 1906 the states had litigated practically every important question bearing upon the delegation of rate-making power to an administrative tribunal and the practical enforcement of such legislation.

At this point it seems proper to note that during the period of state regulation of rates prior to the passage of the Hepburn Act there was no complaint disclosed by any of the hearings of Congressional committees that the action of state railroad commissions was productive of restraint upon interstate commerce or of discriminations against such commerce.

On the other hand in the hearings of the Senate Committee on Interstate Commerce whose report preceded the passage of the Hepburn Act, we do find the statement that because of the regulation of rates by state commissions shipments moving within the confines of a single state were transported at reasonable rates and that "because of the fact that the defendants are unrestrained as to such interstate rates, and by reason of the combination of such defendants whereby competition is eliminated, that such interstate rates are abnormally high." [3] Such "*burdens*" upon and "*interference*" with interstate commerce clearly existed because of the failure of Congress to provide adequate remedies and not because of the proper exercise of the states' power of regulation.

As to the discriminations existing which might become the subject of complaint before the Interstate Commerce Commission it seems proper to take the testimony of a representative of the carriers who is described in the record as "possessing unusual legal attainments" and being "an expert on the subject of transportation" which is as follows:

> As a matter of fact, all the really important controversies between competing localities (which will furnish by all odds the most important and difficult rate-making propositions) grow almost without exception out of interstate rate adjustments *with which state commissions have nothing to do.*[4]

It is a remarkable fact that all of the complaint against state regulation of rates has arisen since Congress gave the Interstate

[3] P. 69 *Sen. Doc. 243, 59th Cong.*

[4] P. 240, *Sen. Doc. 243, 59th Cong.* Statement of Hon. Walker S. Hines. Italics mine.

Commerce Commission power to *free interstate commerce from the evils referred to above.*

The Interstate Commerce Commission originally refused to take jurisdiction over cases involving alleged discriminations between state and interstate rates arising out of the acts of state railroad commissions or the enactments of state legislatures.[5]

THE SHREVEPORT DECISIONS

On further consideration of this subject in connection with the complaint of the Railroad Commission of Louisiana against the St. L. S. W. Ry. C. *et al.* (23 I. C. C. 31) the Interstate Commerce Commission held that it had full jurisdiction to hear such complaint and provide a remedy.

The order of the Commission in this case held that the class rates maintained by the defendant carriers were unjust and unreasonable and a reasonable maximum schedule was fixed for application from Shreveport, Louisiana, to *specified destinations* in Texas and the carriers were required to "abstain from exacting any higher rates for the transportation of any article" from Shreveport to Dallas, Texas and points intermediate *via* the line of the Texas and Pacific and from Shreveport to Houston, Texas and points intermediate *via* the lines of the Houston, east and west Texas and the Houston and Shreveport, "than are contemporaneously exacted for the transportation of such articles from Dallas or Houston for an equal distance toward said Shreveport." The power of the Interstate Commerce Commission to make this order was sustained by the Supreme Court of the United States in *Houston and Texas Ry.* v. *United States* (234 U. S. 342).

Accepting the construction placed upon the Act to Regulate Commerce by the Court as correct for the time being let us note what followed this decision.

The complaint of the Railroad Commission of Louisiana was broadened to include every carrier operating in the state of Texas and every commodity for which rates were fixed by the Railroad Commission of Texas and every article of commerce described in the western classification.

In deciding the enlarged case 41 I. C. C. 83 the Interstate Commerce Commission fixed "reasonable" rates to cover traffic

[5] *Saunders and Co.* v. *Southern Express*, 18 I. C. C. 415.

moving under class rates and certain specified commodity rates from Shreveport, Louisiana, to all points in Texas and also required the establishment of the "current western classification in effect at the time such traffic moves" to govern all shipments within the state of Texas.

There are several important differences between this and the earlier order which was upheld by the Supreme Court of the United States. The earlier order dealt with retail and the later order condemned wholesale discriminations in rates. I do not wish to imply that mere number is important, but the first order was limited to specific movements of traffic in state and interstate commerce while the last order covered any shipment whether state or interstate which came within range of its terms.

In the earlier case every rate fixed by the Commission was declared to be the "reasonable maximum" for application to interstate commerce and state rates were forced to conform to that standard of "reasonableness" to remove the unjust discrimination found. In the last case the Interstate Commerce Commission fixed reasonable rates to apply to class and commodity rates and dealt with classification in the following language:

> Unquestionably the situation between Shreveport and its Texas competitors is such that unless the same classification applies unjust discrimination results. The western classification governs interstate transportation in the territory surrounding Shreveport, including transportation between Texas points and points in other states. *In large part it has received the indorsement of this Commission.* Western Classification Case (25 I. C. C. 442). Considering the findings already made, that transportation conditions for the competitive hauls here involved are substantially similar, *justice demands that the same classification shall apply to all.* . . . . We are therefore constrained to find that for the future defendants must establish and apply to transportation of property *between points in Texas the provisions of the western classification in effect at the time such transportation takes place.*[6]

Assuming that this order is valid as to its requirements governing classification it will be noted that:

1. The shipper at Shreveport may complain to the Interstate Commerce Commission against any rate, rule or regulation contained in the classification since the order of the Commission *does not make such rates, rules and regulations the reasonable maxima to apply to the interstate commerce of Shreveport.*

[6] Italics mine.

2. *No shipper of freight between points in Texas can complain to either the State Railroad Commission of Texas or the Interstate Commerce Commission against any rate rule or regulation in western classification because the Texas Commission may not establish any different rate, rule or regulation since such action would come in "conflict" with the power of Congress under the commerce clause by reason of the resulting "burden" to and "interference" with interstate commerce while the Interstate Commerce Commission cannot act because it has never been given the power to fix reasonable rates governing intrastate transportation.*

Under such circumstances the Texas shipper would find himself as much without a remedy for his complaint as was the fish dealer in Pensacola, Florida, who complained of the alleged discrimination resulting from the fixing of express rates from Mobile to Alabama points and who was denied relief by the Interstate Commerce Commission because of its lack of jurisdiction in *Saunders & Co.* v. *Sou. Express* (18 I. C. C. 415) with this important difference: the Texas shipper cannot even test the reasonableness of the classification, while Saunders & Co. were heard as to the question of reasonableness *per se.*

Under such circumstances it seems proper to inquire as to the extent of the "indorsement" which the western classification was given in the report of the Commission in the Western Classification Case (25 I. C. C. 422). In this case it became the duty of the Interstate Commerce Commission to determine the propriety of changes in the western classification which affected 1,263 descriptions of articles in the classification out of a total of 6,046 descriptions or approximately 21 per cent of the descriptions in the tariff. Since each description usually covers the carload and less-than-carload ratings and may carry such ratings for different kinds of packages it is safe to say that the classification covers 12,000 to 18,000 ratings. The commission estimated the total change in ratings to be not over 2,000; hence from 12 to 17 per cent of the total ratings were passed upon by the Commission, and many were rejected.

Can it be possible that the sovereign states have been so effectually shorn of their power to regulate rates that they may not change a tariff issued by an agent of the carriers which has been "In large part . . . . endorsed by this (the Interstate Commerce) commission." Surely this cannot be the law either within the deci-

sion of the Supreme Court of the United States or the terms of the Act to Regulate Commerce, to say nothing of the Constitution of the United States.

In deciding the Minnesota Rate Case *supra* the Supreme Court of the United States laid down a very high standard of proof to be met as to earnings, expenses and valuation of carriers seeking to set aside a state rate or schedule of rates because of alleged confiscation. In general it may be said that such allegations must be sustained by clear and convincing proof.

MISSOURI RIVER NEBRASKA RATE CASES

If the Interstate Commerce Commission is right in its determination that the circumstances and conditions surrounding Texas intrastate traffic are similar to those surrounding the traffic between Shreveport and Texas points, it must follow that the rates found reasonable as to Shreveport are reasonable as applied to Texas Intrastate traffic, and the rates established by Texas authorities, lower than such Shreveport rates, are simply less than reasonable. Can it be possible that the state should be deprived of its authority to make rates by the judgment of the Interstate Commerce Commission that rates are less than reasonable where the proof is of a less formal or complete character than would be required to establish a charge of confiscation in a court of law? This question has been answered in the Missiouri River Nebraska cases at page 254, as follows:

> The Nebraska commission does not question the duty of this Commission to direct the removal of unjust discriminations caused by differences between interstate and intrastate rates. It recognizes our authority under the decision of the Supreme Court in *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, to direct the removal of such discriminations although state rates are increased thereby. It insists, however, that this authority may not be exercised unless the Commission finds, and is justified by the evidence in finding, that the intrastate rates are confiscatory. This position involves the assumption that a state-made rate or system of rates cannot be said to cause unjust discrimination unless it is unlawful for another reason, namely, that it is so low as to deprive the carriers of their property without due process of law or to deny them the equal protection of the laws. Such an assumption finds no support in those sections of the act which define unjust discrimination and undue prejudice, nor can it be justified in practice or on principle. This Commission is frequently called upon to determine whether a relation of rates is unjustly discriminatory where no question is or can be raised as to whether any of the rates involved are confiscatory. The act gives it no authority to determine whether state-made rates are confiscatory

The position is wholly indefensible that this Commission must inquire into an issue as to which it has no jurisdiction for the purpose of determining a question as to which its jurisdiction is not only complete, but exclusive.

Except for this contention of the Nebraska Railroad Commission and the views of the Interstate Commerce Commission expressed in disposing of this phase of the case there is little difference between this proceeding and the Shreveport Cases. Whenever the conflict between federal and state regulation of rates is discussed the Shreveport and Missouri River Cases will be the main topics but there have been many other decided cases involving similar situations.

CLASSIFICATION OF PERTINENT DECISIONS

In general it may be said that there are four types of cases which have been presented to the Interstate Commerce Commission relating to "discriminations against interstate commerce" arising by comparison of interstate with intrastate rates which may be classified as follows:

1. Discriminations against the interstate commerce of a particular locality arising in connection with the intrastate commerce of certain localities in another state as to commerce with specifically named destinations in the same state.

2. Discriminations against the interstate commerce of certain localities which result from the intrastate rates applied between certain other localities in another state and the communities in whole sections of the same state which are not specifically named.

3. Discriminations which are alleged by certain communities to exist because of the difference between interstate rates to localities in another state as compared with intrastate rates between all points in that state.

4. Discriminations claimed to exist by certain shippers or localities because of the different rates maintained from such localities to various interstate destinations as compared with the varying intrastate rates existing in the several states embraced in the complaint.

The three Shreveport decisions fall within the first, second and third classes in the order named. The Cement Investigation (I. C. C. Docket 8182) is typical of the fourth class of cases. In this case the Interstate Commerce Commission has undertaken an investi-

gation; on its own motion and by consolidation of cases involving complaints filed, and investigations of rate advance cases affecting the cement rates applying between points in Western Trunk Line Territory and between such W. T. L. Territory and adjacent territories.

In the hearings of this case, the state rates and carload minima applying on cement moving within the states of Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma and Colorado were involved. In a similar case, the Livestock Investigation (I. C. C. Docket No. 8436), the scope of the proceeding will cover questions involving both state and interstate rates applying between all parts of the United States.

SOUTH DAKOTA EXPRESS RATE AND ILLINOIS TWO-CENT FARE DECISIONS

Since its decision in the Shreveport case (234 U. S. 342) the Supreme Court has passed on two other important cases involving similar issues.

In *American Express Co.* v. *Caldwell* (decided June 11, 1917) the order of the Interstate Commerce Commission in *Sioux City Commercial Club* v. *American Express Co.* was reviewed and the court held that the express companies were not required to adjust all rates from Sioux Falls and the other South Dakota points named to all other points in the State of South Dakota since the report and order of the Interstate Commerce Commission showed that unjust discrimination existed only in territory commercially tributary to both Sioux City and such Dakota cities. In this connection the Court said:

> Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the point or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic.

In a very recent case[7] this rule was amplified and extended. The carriers sought to increase all passenger fares from the state rate of 2 cents applicable in Illinois to the interstate rate of 2.4 cents per mile approved by the Interstate Commerce Commission for carriage between points in Illinois and adjacent states. The carriers claimed that such action was necessary to comply with an order of the Interstate Commerce Commission (41 I. C. C. 13). The Public Service Commission of Illinois contended that the order of the Commission was in excess of any power that had been or can be conferred on the Interstate Commerce Commission, but, assuming the existence of power to make the order, that the extent to which it was intended to affect the state-made rates was so indefinite as to render the order void and ineffective.

In determining these questions the Court approved its decision in the Shreveport Case as to the powers of the Interstate Commerce Commission, under section 3 of the Act to Regulate Commerce but held that the order which was in controversy was inoperative and of no effect because of its uncertainty.

What is quoted above from the South Dakota Express Case was restated and approved after which the Court said:

In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.[8] This being true of an Act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.

INTENTION OF CONGRESS AND FUTURE ADJUSTMENTS

Careful study of the reports of congressional committees as to the evils for which Congress sought a remedy by the enactment of the Act to Regulate Commerce convinces me that there was no intention on the part of Congress to delegate to the Interstate Commerce Commission the power to set aside state legislation or the lawful acts of the administrative tribunals established by the several states.

[7] The Illinois Passenger Fare Cases decided January 14, 1918.

[8] Italics mine. *Reid* v. *Colorado*, 187 U. S. 137; *Savage* v. *Jones*, 225 U. S. 501; *Cummings* v. *Chicago*, 188 U. S. 410; *M. K. & T. Ry.* v. *Harris*, 234 U. S. 412.

In order to establish the jurisdiction of the Interstate Commerce Commission in the Shreveport Case under the rule of construction stated above, the Commission and the Court were compelled to say in effect that the proviso[9] in section 1 of the Act to Regulate Commerce is merely a general *disavowal of any intention to regulate the rates* to be charged for transportation between points in the same state but Congress nevertheless *did intend* to *regulate partially* such rates in so far as they may be held to produce unjust discrimination against interstate commerce which is forbidden by section 3 of this Act. It seems fair to say that this construction of the act is so strained as to amount to judicial legislation aimed at an evil not comprehended by Congress when the Act was passed.

It seems well to recognize these facts although no substantial purpose can be served by dwelling upon them as an issue of present moment.

By reason of the decisions in the Express and Passenger Rate Cases, the exercise of the powers and duties of the Interstate Commerce Commission in Shreveport cases will be simplified and facilitated. Under these rules some phases of the final Shreveport decision will have to be better supported by evidence or the decision must fall if attacked in the courts.

This better definition of the principles governing such cases will go far to eliminate friction between the state and federal governments which has been increasing since the Shreveport decisions.

I believe that complete harmony in the regulation of inconsistent state and interstate rates in Shreveport cases can be accomplished by proper legislation which will permit *joint hearing and determination of such causes by the representatives of the state and federal government operating under uniform well defined legislative rules properly designed to govern such proceedings.*

Something along this line has been recommended by the Interstate Commerce Commission and it is to be hoped that this vexing question will soon be satisfactorily settled by such appropriate legislation.

[9] "*Provided, however,* that the provisions of this Act (to Regulate Commerce) shall not apply to the transportation of passengers or property . . . . wholly within one state and not shipped to or from a foreign country from or to any State or Territory as aforesaid."